85-650

NUMBER

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

PETITIONERS,

VERSUS

UNITED STATES STEEL CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

JAMES B. McCORSTIN, JR., PRO SE
1108 50TH. STREET, WEST
BIRMINGHAM, ALABAMA 35208
(205) 785-8872

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7422

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

(May 29, 1985)

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

This is an appeal from the district court's judgment conforming to a jury verdict for defendant in an age discrimination case.

*Honorable Seybourn H. Lynne, U. S. District Judge for the Northern District of Alabama, sitting by designation.

In this court the plaintiff contends that: (1) the district court erred in disallowing plaintiff's amendment to include other claims which had been the subject of timely filed notices of intent to sue; (2) the lower court erred in excluding certain evidence; and (3) the district court erred in its instructions to the jury.

From our consideration of the record, briefs and oral argument we conclude that reversible error has not been demonstrated.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED: JULY 8, 1985
SPENCER D. MERCER
CLERK

No. 84-7422

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

- - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 29, 1985, 11 Cir., 198_, _____F.2d_____).

(July 8, 1985)

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DE-

NIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ ROBERT S. VANCE
United States Circuit Judge

*Honorable Seybourn H. Lynne, U. S. District Judge for the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED: JUL 24, 1985
Spencer D. Mercer
Clerk

No. 84-7422

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

- - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - -

O R D E R :

(X) The motion of appellant, James B. McCorstin, Jr. for stay of the mandate pending petition for writ of certiorari is DENIED.

Appellant's motion for clarification

of the opinion of May 29, 1985 and order of July 8, 1985 is DENIED.

/S/ ROBERT S. VANCE
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7422

D.C. Docket No. 74-0100

JAMES B. McCORSTIN, JR.,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION,

Defendant-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - -

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

*Honorable Seybourn H. Lynne, U. S. District Judge for the Northern District of Alabama, sitting by designation.

Entered: May 29, 1985
For the Court: Spencer D. Mercer, Clerk

By: /S/ Miguel J. Cort, Jr.
Deputy Clerk

ISSUED AS MANDATE: JUL 24 1985

DO NOT PUBLISH
U.S. Court of Appeals
FILED: Sep 5 1980
Gilbert F. Ganaucheau
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3593

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

Plaintiff-Appellant,

versus

UNITED STATES STEEL CORPORATION, a corporation

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(SEPTEMBER 5, 1980)

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

BY THE COURT:

This matter is before us upon the mo-

tion for clarification filed by appellant. For the reasons stated, the motion is granted.

On January 31, 1974, James B. McCorstin, Jr. filed suit in the United States District Court for the Northern District of Alabama. The defendant is the United States Steel Corporation. The assigned file number in the district court is CA 74H100 S. This suit involved a variety of claims under the Age Discrimination in Employment Act. After a directed verdict in favor of the defendant, McCorstin appealed. On July 16, 1980, a panel of this court reversed and remanded that case for additional discovery and a jury trial. (Case No. 78-1957, opinion dated July 16, 1980 and found at page 7436, slip opinions.)

The complaint giving rise to this proceeding was filed on May 15, 1979, between the same parties, in the same dis-

trict court. The file number assigned is CA 79M0535S. On August 20, 1979, by way of a Memorandum Opinion, the district court entered summary judgment in favor of the defendant. McCorstin appealed. Under date of June 10, 1980, a panel of this court affirmed that ruling.

As stated by the trial judge when ruling in case number CA 79M0535 S,

> "The only new claims that plaintiff has included in this complaint are, first, that defendant has recently failed to post required notice about the Age Discrimination Act and, second, that defendant published an advertisement that was illegal under the Age Discrimination Act."

The trial court ruled that the plaintiff lacked standing to raise these claims. The basis for the court's reasoning was that the final judgment entered in case number CA 79M0535 S was

res judicata as to all other claims raised in CA 79M0535 S and consequently McCorstin lacked a "personal stake" as to these claims. Today that basis does not exist because the final judgment in CA 74H100 S has been reversed.

In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.

Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable.

FILED: Jul 22 1981
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK
ENTERED: Jul 22 1981

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES B. McCORSTIN, JR.,

Plaintiff,

v. Civil Action No.: CV74-PT-0100-S

UNITED STATES STEEL CORP.,

Defendant.

ORDER

In accordance with the Memorandum Opinion contemporaneously entered herewith, it is ORDERED that plaintiff's Motion to Amend Complaint be, and the same hereby is, GRANTED to the extent the amended complaint seeks to allege that defendant failed to post in conspicuous places posters, etc., as required by the Age Discrimination Act, that said motion be, and the same hereby is, DENIED as to any

class allegations, and that said motion be, and the same hereby is, DENIED to the extent it seeks to allege punitive damages.

DONE and ORDERED this 21 day of July, 1981.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

FILED: Jul 22 1981
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
ENTERED Jul 22 1981

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES B. McCORSTIN, JR.,

Plaintiff,

v.

Civil Action No.:
CV74-PT-0100-S

UNITED STATES STEEL CORPORATION,

Defendant.

MEMORANDUM OPINION

This cause, in its seemingly never ending procession to a final disposition on the merits, comes on to be heard on plaintiff's Motion to Amend Complaint in which plaintiff seeks leave to file a Secord Amended Complaint containing several class allegations. The parties have presented oral argument on said motion at a previous motion docket and, pursuant to the court's request at the motion docket,

have submitted additional briefs on the motion.

The court has entirely reviewed this cause, from the initial proceeding before Judge Hancock to the current motion. Having read Judge Hancock's order, the Fifth Circuit's opinion reversing that order (621 F.2d 749 (1980), Chief Judge McFadden's order granting defendant's Motion for Summary Judgment in a companion case (CA79-M-0535-S), and the Fifth Circuit's clarifying order issued after McCorstin I, 621 F.2d 749, the court has concluded that any attempt to amend plaintiff's complaint to assert a class action should be denied. Such an amendment would be immediately subject to a motion to dismiss; the court need not indulge in the futility of allowing the amendment only to dismiss the class allegations upon filing of a motion to dismiss.

DeLoach v. Woodley, 405 F.2d 496, 496-97 (5th Cir. 1968). The Fifth Circuit, in McCorstin I, specifically held that Judge Hancock "was correct" when he denied the motion for a class action. McCorstin I was reversed and remanded for a jury trial on the merits of McCorstin's individual claims. The class issue was foreclosed by McCorstin I. The clarifying order entered in McCorstin II contains nothing to negate that conclusion. In McCorstin II plaintiff filed a complaint which Chief Judge McFadden construed to contain the same allegations as were made in McCorstin I save two claims, that U.S. Steel failed to post required notice about the Age Discrimination Act, and that U.S. Steel published an advertisement that was illegal under the Age Discrimination Act. Nevertheless, Judge McFadden ruled that McCorstin lacked standing to raise the two additional

claims based upon the final judgment entered in Judge Hancock's case. Judge McFadden held that McCorstin I was res judicata on the two additional claims attempted to be raised in McCorstin II. Subsequent to Judge McFadden's ruling in McCorstin II, the Fifth Circuit reversed Judge Hancock's ruling in McCorstin I thereby removing the basis for Judge McFadden's ruling in McCorstin II. The purpose of the Fifth Circuit's clarifying order was, in this court's opinion, to emphasize that nothing said or done in McCorstin II should act to bar "any amendments he may propose to his pleadings in McCorstin I; i.e. any claims barred by Judge McFadden in McCorstin II on the basis of res judicata, or any other claims McCorstin had standing to bring. The Fifth Circuit's clarifying order should not be read, and this court does not so read it, to mean that McCorstin could at-

tempt to re-assert class allegations. Thus, to the extent the Second Amended Complaint seeks to allege class allegations, it is due to be denied.

Since the Fifth Circuit's clarifying Order should be read to mean that plaintiff has the right to amend his complaint to assert any individual claims to save multiple suits, the court has searched the proposed Second Amended Complaint to see what, if any, new claims are alleged. Even though couched in terms of injury to a class, the proposed amendment does assert that the defendant failed to post in conspicuous places posters concerning rights under the Age Discrimination Act, a claim similar to one of the two claims barred in McCorstin II. The amendment should be allowed to the extent it attempts to allege this particular claim.

The proposed amendment also seeks $100 Million in punitive damages. Punitive

damages are not recoverable in a private action brought under the Age Discrimination Act. Murphy v. American Motors Sales Corp., 570 F.2d 1226 (5th Cir.1968). Thus, to the extent the proposed amendment seeks punitive damages, it is due to be denied.

An Order consistent with this Memorandum will be contemporaneously entered.

DONE this 21 day of July, 1981.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

STATUTES INVOLVED

FAIR LABOR STANDARDS ACT OF 1938, CHAPTER 8, TITLE 29 U.S.C. § 216(b)

§ 216. Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount

as liquidated damages. An action ro recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of eompetent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party

plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, CHAPTER 14, TITLE 29 U.S.C.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preferance, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(2) to observe the terms of a bona fide

seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

(Pub. L. 90-202, §4, Dec. 15, 1967, 81 Stat. 603; Pub. L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub. L. 97-248, title I, § 116(a), Sept. 3, 1982, 96 Stat. 353.)

AMENDMENTS

1982-Subsec. (g), Pub. L. 97-248 added subsec. (g).

1978-Subsec. (f)(2). Pub. L. 95-256 provided that no seniority system or employee benefit plan require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of the individual.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 116(c) of Pub. L. 97-248 provided that: "The amendment made by subsection (a) [enacting subsec. (g) of this section] shall become effective on January 1, 1983, and the amendment made by subsection (b)[enacting section 1395y(b)(3) of Title 42, The Public Health and Welfare] shall apply with respect to items and services furnished on or after such date."

EFFECTIVE DATE OF 1978 AMENDMENT

Section 2(b) of Pub. L. 95-256 provided that: "The amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect on the date of enactment of this Act, [Apr. 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 [section 206(d)(4) of this title]), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act [amending section 631 of this title], the amendment made by subsection (a) of this section [amending subsec. (f)(2) of this section] shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first."

TRANSFER OF FUNCTIONS

All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R.

19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 626 of this title.

§ 626. Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be

deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through in-

formal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such ac-

tion.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred;

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the stat-

ute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

(Pub. L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; Pub. L. 95-256, § 4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

AMENDMENTS

1978-Subsec. (c). Pub. L. 95-256, § 4 (a), designated existing provisions as par. (1) and added par. (2).

Subsec. (d). Pub. L. 95-256, § 4(b)(1), substituted references to the filing of a charge with the Secretary alleging unlawful discrimination for references to the filing with the Secretary of notice of intent to sue.

Subsec. (e). Pub. L. 95-256, § 4(c)(1), designated existing provisions as par. (1) and added par. (2).

EFFECTIVE DATE OF 1978 AMENDMENT

Section 4(b)(2) of Pub. L. 95-256 provided that: "The amendment made by paragraph (1) of this subsection [amending subsec. (d) of this section] shall take effect with respect to civil actions brought after the date of enactment of this Act [Apr. 6, 1978]."

Section 4(c)(2) of Pub. L. 95-256 provided that: "The amendment made by paragraph (1) of this subsection [enacting

subsec. (e)(2) of this section] shall take effect with respect to conciliations commenced by the Secretary of Labor after the date of enactment of this Act [Apr. 6, 1978]."

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "Commission" were substituted for "Secretary", meaning the Secretary of Labor, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R.1053.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 633 of this title.

§ 627, Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to

effectuate the purposes of this chapter.

(Pub. L. 90-202, § 8, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1. § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "Commission" were substituted for "Secretary", meaning the Secretary of Labor, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

§ 630. Definitions

For the purposes of this chapter -

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each

working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to

be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(Pub. L. 90-202, § 11, Dec. 15, 1967, 81 Stat. 605; Pub. L. 93-259, § 28(a)(1)-(4), Apr. 8, 1974, 88 Stat. 74.)

REFERENCES IN TEXT

The National Labor Relations Act, referred to in subsec. (e)(1), is act July 5, 1935, ch. 372, 49 Stat. 452, as amended, which is classified generally to subchapter II (§ 151 et seq.) of chapter 7 of this title. For complete classification of this Act to the Code, see section 167 of this title and Tables.

The Railway Labor Act, referred to in subsec. (e)(1), in act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§ 151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and

Tables.

The Labor-Management Reporting and Disclosure Act of 1959, referred to in subsec. (h), is Pub. L. 86-257, Sept. 14, 1959, 73 Stat. 519, as amended, which is classified principally to chapter 11 (§ 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title, and Tables.

For definition of Canal Zone, referred to in subsec. (i), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

The Outer Continental Shelf Lands Act, referred to in subsec. (i), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§ 1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

AMENDMENTS

1974-Subsec. (b). Pub. L. 93-259, § 28(a)(1), (2), substituted in first sentence "twenty" for "twenty-five" and, in second sentence, defined term "employer" to include a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, and deleted text excluding from such term a State or political subdivision thereof.

Subsec. (c), Pub. L. 93-259, § 28(a)(3), deleted text excluding from term "employment agency" an agency of a State or po-

litical subdivision of a State, but including the United States Employment Service and the system of State and local employment services receiving Federal assistance.

Subsec. (f). Pub. L. 93-259, § 28(a)(4), excepted from the term "employee" elected public officials, persons chosen by such officials for such officials' personal staff, appointees on policymaking level, and immediate advisers with respect to exercise of constitutional or legal powers of the public office but excluded from such exemption employees subject to civil laws of a State government, governmental agency, or political subdivision.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-259 effective May 1, 1974, see section 29(a) of Pub. L. 93-259, set out as a note under section 202 of this title.

TRANSFER OF FUNCTIONS

All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

CROSS REFERENCES

Industry affecting commerce, see section 402 of this title.

Outer Continental Shelf, see section 1331 of Title 43, Public Lands.

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age.

(Pub. L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub. L. 95-256, §3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

AMENDMENTS

1978-Subsec. (a). Pub. L. 95-256, § 3 (a), designated existing provisions as subsec. (a) and, in subsec. (a) as so designated, substituted "40 years of age but less than 70 years of age" for "forty years of age but less than sixty-five years of age".

Subsecs. (b), (c), Pub. L. 95-256, § 3 (a), added subsecs. (b) and (c).

Subsec. (d). Pub. L. 95-256, § 3(b)(3), struck out subsec. (d), which related to employees serving under contracts of unlimited tenure at institutions of higher education effective July 1, 1982. See Effective and Termination Dates of 1978 Amendment note below.

Pub. L. 95-256, § 3(a), added subsec. (d).

EFFECTIVE AND TERMINATION DATES OF 1978 AMENDMENT

Section 3 of Pub. L. 95-256 provided that:

"(1) Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section [subsecs. (a), (c), and (d) of this section] shall take effect on January 1, 1979.

"(2) Section 12(b) of such Act, as amended by subsection (a) of this section [subsec. (b) of this section], shall take effect on September 30, 1978.

"(3) Section 12(d) of such Act, as amended by subsection (a) of this section [enacting subsec. (d) of this section], is repealed on July 1, 1982."

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" was substituted for "Secretary", meaning the Secretary of Labor, in subsec. (c)(2) pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 622, 623, 624, 633a of this title; title 5 sections 2302, 7702; title 22 section 3905.

TO THE SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR.

IN RE: Notice pursuant to Title 29, Sec. 626(d) of intent to file civil action, and in the alternative, of intent to amend and/or intervene in civil action presently pending.

1. Come now the following named individuals, separately and severally, and give notice to the Secretary of Labor of the United States (hereinafter referred to as "Secretary") and to the Department of Labor of the United States (hereinafter referred to as "Department") of intent to file civil action against United States Steel Corporation, a corporation (hereinafter referred to as "U.S. Steel") under Chapter 14, Title 29 of the United States Code (age discrimination in employment); or, in the alternative, of intent to amend and/or intervene in the case of James B. McCorstin, Jr., et al. v. U. S. Steel, C.A. 74-H-100-S, in the United States District Court for the Northern

District of Alabama, Southern Division:

W. J. Barrett
725 Oakland Drive
Fairfield, Alabama 35064

Ruth Christian
6001 Court H
Birmingham, Alabama 35228

Marshall T. Welch
Suite 201, 3100 Lorna Road
Birmingham, Alabama 35216

O. V. Canant
1005 Second Ave., Pleasant Grove
Fairfield, Alabama 35237

Virginia Rogers
1837 47th Street, Central Park
Birmingham, Alabama 35208

Joseph H. Narro
4401 Avenue H
Fairfield, Alabama 35064

Joseph L. Johnson
5213 7th Court South
Birmingham, Alabama 35212

Talmadge Taylor
Box 64
Mulga, Alabama 35118

P. J. Zukow
801 Avenue K
Lipscomb, Alabama 35020

Willard F. Nelson
2304 Savoy Street
Birmingham, Alabama 35226

Robert M. Kirby
1405 34th Street, Ensley
Birmingham, Alabama 35218

Carlton Neugent
100 Merrywood Drive
Birmingham, Alabama 35214

John R. Bailey
2628 24th Street West
Birmingham, Alabama 35208

R. E. Fortner
4213 Franklin Avenue
Fairfield, Alabama 35064

John R. Armstrong
945 6th Street, Pleasant Grove
Fairfield, Alabama 35127

Edmond Randle
141 Waverly Circle
Bessemer, Alabama 35020

Thomas H. Franklin
917 38th Street South
Birmingham, Alabama 35222

Brice B. Wigginton
1404 5th Avenue West
Birmingham, Alabama 35208

W. R. Ling
640 Park Avenue
Fairfield, Alabama 35064

W. H. Baxley

2. U.S. Steel has its home office at 600 Grant Street, Pittsburgh, Pennsylva-

nia 15230. It is the world's largest steel manufacturer and operates works throughout the country. It has a large works and offices in Jefferson County, Alabama. Each of the above-named individuals (hereinafter referred to as "Claimants") formerly was employed by U.S. Steel, and while between the ages of 40 and 65 years, was discriminated against by U.S. Steel because of age by being coerced to retire before attaining the age of 65 [illegible] accepting a "mutually satisfactory retirement", which, in fact, was unsatisfactory, but the only alternative available in lieu of lay-off without pay tantamount to discharge.

3. On May 18, 1976, there appeared in "The Birmingham News" an advertisement sponsored by U.S. Steel clearly indicating its preference for youthful employees under the age of 40, in direct violation

of Title 29, Sec. 623(e), United States Code. A facsimile of the text of said advertisement is attached hereto as APPENDIX A, and incorporated herein. "The Birmingham News" is a daily newspaper and has the widest circulation of any newspaper in the State of Alabama. Claimants are informed and believe, and upon such information and belief state that similar advertisements appeared in other publications of wide circulation throughout Alabama and the United States at the same time.

4. The above-named individuals intend to file an action against U.S. Steel under Chapter 14 of Title 26, based upon the continuing discrimination practiced by U.S. Steel against them in that neither of them have been offered re-employment by the same despite its recruitment of younger employees to fill similar posi-

tions.

5. The status of the action entitled McCorstin vs. U.S. Steel, supra, is that the District Judge before whom the same is pending has issued an order that the same may not be maintained as a class action, or on behalf of anyone other than the said McCorstin. As an alternative to the action described in Paragraph 4, above, claimants intend to seek to intervene as parties plaintiff in said action (or, as to others who are already named as parties therein, to be reinstated as parties thereto), and, in addition, to seek reconsideration of the order of said District Judge precluding maintenance of the action as a class action.

6. Either alternative (those named in Paragraphs 4 and 5) will be maintained by claimants as a class action on behalf of themselves, and on behalf of all other

persons similarly situated, to-wit: all persons discriminated against by U.S. Steel prior to May 18, 1976, in the manner aforesaid in Paragraph 2, hereof.

/S/ John P. Carlton
JOHN P. CARLTON
Attorney for Claimants

CARLTON, BOLES, CLARK & STICHWEH
903 Frank Nelson Building
Birmingham, Alabama 35203

I certify that a copy of the foregoing has been delivered to the Office of the United States Department of Labor, Wage and Hour and Public Contracts Division, in Birmingham, Alabama, this 12th day of November, 1976; and that copies of the same have been mailed to the Secretary of Labor of the United States in Washington, D.C., and to counsel of record in the case of McCorstin vs. U.S. Steel on the same date.

/S/ John P. Carlton

(Facsimile of Lydia Mitcham
adjacent to advertisement)

"Lydia Mitcham has two things going for her. One is a bachelor's degree in engineering. The other is a master's degree in business.

On second thought, make that three things. She is an American citizen, who is limited only by her ability and initiative.

As a recent graduate of Vanderbilt University and a management trainee at our Fairfield Works, Miss Mitcham has an unlimited future. She is typical of the bright young men and women who are finding challenging and rewarding career opportunities at U.S. Steel.

And she is part of the American tradition which offers every individual an opportunity to realize his or her full potential. We are proud of Lydia Mitcham and the many young men and women like her,

who are an important part of U.S. Steel.

$U_S S$ FAIRFIELD WORKS

UNITED STATES STEEL"

App.A